ATTORNEY GENERAL'S OPEN RECORDS AND MEETINGS OPINION
No. 2000-O-13

DATE ISSUED: December 14, 2000

ISSUED TO: Norbert Sickler, Administrator, Southwest Multi-County Correction Center

CITIZEN'S REQUEST FOR OPINION

On August 14, 2000, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Jack McDonald on behalf of The Dickinson Press asking whether Norbert Sickler, administrator of the Southwest Multi-County Correction Center, violated N.D.C.C. § 44-04-18 by denying a request for access to medical records of a deceased juvenile inmate and by failing to describe the legal basis for the denial.

FACTS PRESENTED

A juvenile died on November 6, 1999, in the custody of the Southwest Multi-County Correction Center (SWMCCC). The juvenile had been assigned to the SWMCCC by a tribal court, rather than a North Dakota juvenile court or a federal court. In the 11 months since the death, The Dickinson Press has attempted, with limited success, to obtain access to the SWMCCC's records regarding the deceased juvenile inmate. Most recently, in a July 6, 2000, letter, The Dickinson Press requested:

> [a]ccess to [the deceased juvenile's] complete file so The Press can determine what further copies of records it needs. This would include access to any medical files or files containing information about any medical interventions.

The letter also insisted that any denial be in writing and explain the legal authority for the denial.

In a letter dated July 12, 2000, Norbert Sickler, administrator of the SWMCCC, indicated that most of the juvenile's records had already been made available to The Dickinson Press but further replied: "I will need to continue [to] exclude [access to] the medical files." He explained: "Medical records are continuing to be excluded based on conversation with the ND Attorney General's office, our health care administrator as well as legal council [sic]."

In response to the request for this opinion, staff members in this office have reviewed, at the SWMCCC, the records Mr. Sickler has withheld.

ISSUES

1. Whether the SWMCCC violated N.D.C.C. § 44-04-18(6) by failing to describe the legal authority for its denial of the request for the medical records of the deceased juvenile.

2. Whether the SWMCCC violated N.D.C.C. § 44-04-18 by denying the request for the medical records of the deceased juvenile.

ANALYSES

Issue One:

All records and meetings of the SWMCCC are open to the public unless "otherwise specifically provided by law." 1998 N.D. Op. Att'y Gen. O-17, O-20 (Mar. 3 to Norbert Sickler and Franklin Appledorn), citing N.D.C.C. §§ 44-04-18 and 44-04-19. Once a request for records is made to a public entity under N.D.C.C. § 44-04-18, the entity must either provide the records or explain why the records are not being provided. N.D.C.C. § 44-04-18(6). If the entity denies the request, it is required to "describe the legal authority for the denial." Id. (emphasis added).

A similar requirement applies when a governing body wants to close a portion of its meeting to the public. The governing body is required, among other things, to announce the "legal authority for holding an executive session on [the announced] topics." N.D.C.C. § 44-04-19.2(2)(b) (emphasis added). To satisfy this requirement, a governing body must describe the statutory basis for closing the meeting, but is not required to cite the particular statute on which it is relying. 1999 N.D. Op. Att'y Gen. O-20, O-23 (Apr. 22 to Gregory Lange).

Mr. Sickler's explanation for his denial of the request of The Dickinson Press, "based on conversation with the ND Attorney General's office, our health care administrator as well as legal council [sic]," does not describe any legal basis for the denial. A member of the public who reads Mr. Sickler's explanation would still have no idea what "law" was being relied on as a specific exception to the open records law. See N.D.C.C. § 44-04-17.1(7) ("law" includes "federal statutes, applicable federal regulations, and state statutes").

A similar conclusory statement was held to be insufficient in 1998 N.D. Op. Att'y Gen. O-10 (Feb. 20 to Glenn Giese and Lester Brackel). In that opinion, the public entity's response simply stated that no records subject to the request were available to the public, without any further explanation of the legal basis for the denial. Id. at O-12, O-14. This contrasts with the situation presented in 1997 N.D. Op. Att'y Gen. O-1 (Nov. 20 to Bob Harvey and Patricia Burke). In that opinion, the public entity did not provide the number of the state law that made the requested records exempt from the open records law, but stated that the entity was relying on the exemption for active criminal investigation. Id. at O-5. With this information, the requester could identify N.D.C.C. § 44-04-18.7 as the statute on which the public entity was relying.

A record or meeting of a public entity may not be closed to the public without specific legal authority. N.D.C.C. §§ 44-04-18, 44-04-19. To properly invoke such authority to deny access to a record or exclude the public from a portion of a meeting, the public entity must identify and explain that authority. N.D.C.C. §§ 44-04-18(6), 44-04-19.2(2)(b). Mr. Sickler's explanation for his denial of the request by The Dickinson Press is devoid of any reference to legal authority. The advice of his legal counsel or medical staff, or even this office, does not qualify as an exception to the open records law, nor does Mr. Sickler's reference to such advice sufficiently explain the "legal authority" for his denial. It is my opinion that the SWMCCC violated N.D.C.C. § 44-04-18(6) by failing to describe the legal authority for its denial of the request for access to the medical records of the deceased juvenile inmate.

Issue Two:

This is the third opinion issued by this office on whether the records of the SWMCCC regarding the deceased juvenile inmate are open to the public. See 2000 N.D. Op. Att'y Gen. 51 (Feb. 28 to Frank Wald); 2000 N.D. Op. Att'y Gen. L-4 (Jan. 18 to Timothy Priebe). In both prior opinions, I concluded that state laws making juvenile records closed or confidential did not apply to the records of the deceased juvenile. In Mr. Sickler's response to the request for this opinion, he acknowledges that "our state legislature has not specifically addressed the confidentiality of . . . records which are in the possession of the SWMCCC or similar facilities." Nevertheless, he lists several additional statutes and makes other legal arguments in support of his continued position that the medical records of the deceased juvenile inmate fall under a specific exception to N.D.C.C. § 44-04-18.

Mr. Sickler relies on the open records exception in N.D.C.C. § 50-25.1-14 for child abuse and neglect reports. None of the requested records regarding the deceased juvenile inmate are abuse and

neglect reports. Mr. Sickler's reliance on this statute is unwarranted.

Mr. Sickler also relies on the exception in N.D.C.C. § 15.1-24-04 for medical records generated under a school chemical abuse prevention program and asserts that the SWMCCC qualifies as a school. None of the requested records regarding the deceased juvenile inmate are medical records generated under a school chemical abuse prevention program. Mr. Sickler's reliance on this statute is unwarranted.

Mr. Sickler further relies on an administrative rule promulgated by the Department of Corrections and Rehabilitation (DOCR) under N.D.C.C. § 12-44.1-24. This rule, N.D.A.C. § 94-02-06-07, was removed from the administrative code in 1999. In addition, nothing in N.D.C.C. § 12-44.1-24 provides specific legal authority for the DOCR to make medical records confidential by administrative action. Mr. Sickler's reliance on this statute and the former administrative rule is unwarranted.

Mr. Sickler further relies on N.D.C.C. § 12-47-36, which makes confidential the medical records of the DOCR "relating to persons in the custody or under the supervision and management of the department of corrections and rehabilitation." Mr. Sickler argues that the SWMCCC is under the "supervision and management" of the DOCR because it is required to follow the administrative rules promulgated by the DOCR under N.D.C.C. § 12-44.1-24. However, he misconstrues the language of this statute. The phrase "supervision and management" refers to "persons," such as those on parole or probation, who are not in the custody of the DOCR but are nevertheless under the DOCR's "supervision and management." The statute does not apply to correctional facilities outside the DOCR such as the SWMCCC. Mr. Sickler's reliance on this statute is unwarranted.

Mr. Sickler further relies on N.D.C.C. § 43-47-09, which provides that a counselor who is licensed under N.D.C.C. ch. 43-47 may not "be required to disclose information acquired in rendering counseling services without the consent of the person who received the counseling services." Mr. Sickler’s reliance on this statute is unwarranted for two reasons. First, N.D.C.C. ch. 43-47 does not apply to counselors employed by a governmental entity like the SWMCCC. N.D.C.C. § 43-47-05(2). Second, the SWMCCC employs addiction counselors who are licensed under N.D.C.C. ch. 43-45 and not under N.D.C.C. ch. 43-47.

Perhaps the strongest legal authority for making some of the records of the SWMCCC confidential is not found in state law or in Mr. Sickler’s response to the request for this opinion, but in the federal laws and regulations governing drug and alcohol abuse programs. See generally 42 U.S.C. § 290dd-2; 42 C.F.R. part 2. However, the records which are confidential under these federal provisions are limited to those which

"[w]ould identify a patient as an alcohol or drug abuser either directly, by reference to other publicly available information, or through verification . . . by another person . . . ." 42 C.F.R. § 2.12(a)(1)(i). This provision does not apply to the records withheld by Mr. Sickler regarding the deceased juvenile inmate because the records do not indicate whether the juvenile was an alcohol or drug abuser.[1]

Mr. Sickler next asserts that the requested medical records are protected by a person's "fundamental right of privacy guaranteed by the Federal Constitution." In support, he cites Brillantes v. Superior Court, 58 Cal. Rptr. 2d 770 (Cal. Ct. App. 1996). However, his reliance on this decision is misplaced. The facts in Brillantes are much different than the facts presented here. In addition, the court in Brillantes simply followed an earlier decision, Palay v. Superior Court, 22 Cal. Rptr. 2d 839 (Cal. Ct. App. 1993). A review of the Palay decision reveals that, after mentioning the federal right of privacy identified in Griswold v. Connecticut, 381 U.S. 479 (1965), the court reached its decision based on the right to privacy in the California Constitution. 22 Cal. Rptr. 2d at 847. These decisions do not support Mr. Sickler's claim that the requested records are protected by a federal right of privacy. Rather, one must refer to federal court decisions to determine whether the records are protected by a federal constitutional right to privacy.

The federal courts of appeals are not in total agreement on the scope of any right of privacy in the federal constitution. The court of appeals for this circuit has summarized its analysis as follows:

> The Supreme Court has recognized that notions of substantive due process contained within the Fourteenth Amendment safeguard individuals from unwarranted governmental intrusions into their personal lives. Whalen v. Roe, 429 U.S. 589, 598 n. 23, 97 S.Ct. 869, 876 n. 23, 51 L.Ed.2d 64 (1977). This right to privacy actually encompasses two separate types of interests. Id. at 598-99, 97 S.Ct. at 875-76. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest

[1] A complicated situation might arise when confidential alcohol and drug abuse patient records are requested and a public entity is required under N.D.C.C. § 44-04-18(6) to explain its "legal authority" for denying the request. By citing the appropriate federal provisions, a public entity would, in effect, be acknowledging a person's presence in a drug or alcohol abuse facility, which is prohibited. 42 C.F.R. § 2.13(c). In such a situation, 42 C.F.R. § 2.13(c)(2) explains that the public entity must provide a copy of the appropriate federal regulations without acknowledging whether the regulations specifically restrict disclosure of records regarding the identified individual.

> in independence in making certain kinds of important decisions." Id. at 599-600, 97 S.Ct. at 876 (footnote omitted).
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> Only the former concern, which has been characterized as the right to confidentiality, is at issue here. This protection against public dissemination of information is limited and extends only to highly personal matters representing "the most intimate aspects of human affairs." Wade v. Goodwin, 843 F.2d 1150, 1153 (8th Cir.), cert. denied, 488 U.S. 854, 109 S.Ct. 142, 102 L.Ed.2d 114 (1988). "[T]o violate [a person's] constitutional right of privacy the information disclosed must be either a shocking degradation or an egregious humiliation of her to further some specific state interest, or a flagrant bre[a]ch of a pledge of confidentiality which was instrumental in obtaining the personal information." Alexander v. Peffer, 993 F.2d 1348, 1350 (8th Cir. 1993). To determine whether a particular disclosure satisfies this exacting standard, we must examine the nature of the material opened to public view to assess whether the person had a legitimate expectation that the information would remain confidential while in the state's possession. Sheets v. Salt Lake County, 45 F.3d 1383, 1387-88 (10th Cir.), cert. denied, --- U.S. ----, 116 S.Ct. 74, 133 L.Ed.2d 34 (1995); see also Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 457-58, 97 S.Ct. 2777, 2797-98, 53 L.Ed.2d 867 (1977) (suggesting that an individual's legitimate expectation of privacy plays a pivotal role in this constitutional analysis). "When the information is inherently private, it is entitled to protection." Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 812 F.2d 105, 116 (3d Cir. 1987).

Eagle v. Morgan, 88 F.3d 620, 625 (8th Cir. 1996). For reasons discussed below, I conclude that the deceased juvenile inmate had no reasonable expectation that her medical records would be private, or would remain private after her death at the SWMCCC.

Prior decisions from the federal circuit courts of appeals clarify and narrow the question presented in this opinion. First, the status of the deceased inmate as a juvenile, rather than an adult, is not significant. See J.P. v. DeSanti, 653 F.2d 1080, 1090 (6th Cir. 1981) (confidentiality of juvenile court records is not a right which is "fundamental" or "implicit in the concept of ordered liberty."). Second, an injury to the deceased juvenile inmate's reputation, by itself, is not a constitutional violation and will not support a civil action under 42 U.S.C. § 1983. Riley v. St. Louis County, 153 F.3d 627, 631 (8th Cir. 1998); Wade v. Goodwin, 843 F.2d 1150, 1152 (8th Cir. 1988).

Two circuits have noted that, until recently, there was no "Supreme Court case or 'appellate holding that prisoners have a constitutional right to confidentiality of their medical records.'" Tokar v. Armontrout, 97 F.3d 1078, 1084 (8th Cir. 1996), quoting Anderson v. Romero, 72 F.3d 518, 523 (7th Cir. 1995). In 1999, the Second Circuit made a similar observation, but further noted that inmates do not "shed all fundamental protections of the Constitution at the prison gates" and found as a matter of first impression that a prisoner had a federal constitutional right of confidentiality regarding the prisoner's status as a transsexual. Powell v. Schriver, 175 F.3d 107, 112-14 (2nd Cir. 1999) (quotation omitted). Thus, there is persuasive legal authority for the position that the deceased juvenile's status as an inmate does not automatically grant or remove any right to privacy she might otherwise have in her medical records.

The Eighth Circuit observed in Eagle v. Morgan "that the exact boundaries of [the right to privacy] are, to say the least, unclear." 88 F.3d at 625. However, in responding to the issue presented in this opinion, it is not necessary to define the precise scope of the federal right to privacy. Rather, I will assume that the deceased juvenile inmate has some form of privacy interest in her medical records at a public correctional facility. Nevertheless, even under the broadest interpretation of the federal right to privacy by the federal appellate courts, the right is not absolute and is balanced against the interests which would be served by disclosure of the information. See, e.g., Doe v. City of New York, 15 F.3d 264 (2nd Cir. 1994); U.S. v. Westinghouse Elec. Corp., 638 F.2d 570 (3rd Cir. 1980).

Applying this balancing test, there are two important facts to consider in this case. First, any privacy interest of the inmate in her medical records is significantly reduced, if not eliminated, by her death. Second, one must remember that the inmate died while in the custody of a public corrections facility which continues to serve a large number of juvenile inmates. The facts surrounding her death, and the overall safety of the SWMCCC, are important public issues.

Applying the balancing test in U.S. v. Westinghouse Elec. Corp. and Doe v. City of New York to the facts in this situation, I conclude that releasing the requested medical records regarding the deceased juvenile inmate would not violate even the broadest reading of a federal constitutional right to privacy. Rather, "the protection of a person's general right to privacy his right to be left alone by other people is, like the protection of his property and his life, left largely to the law of the individual States." City of Grand Forks v. Grand Forks Herald, 307 N.W.2d 572, 579, citing Katz v. United States, 389 U.S. 347 (1967).

The North Dakota Supreme Court has twice considered whether there is an implied right to privacy under the North Dakota Constitution and, if so, whether such an implied right is an exception to the express open records provisions in N.D.C.C. § 44-04-18 and Article XI, Section 6 of the North Dakota Constitution. Hovet v. Hebron Public School Dist., 419 N.W.2d 189 (N.D. 1988); City of Grand Forks v. Grand Forks Herald, 307 N.W.2d at 579. In both cases, the court concluded that, to the extent such a right exists, it does not remove personnel records of a public employee from the application of the open records law. The court observed that the recognition of an implied constitutional right to privacy is generally reserved to matters involving marriage, procreation, contraception, family relationships, child rearing, and education. Id. The records withheld by Mr. Sickler do not involve any of these limited subjects.

Two justices suggested in a special concurrence in City of Grand Forks v. Grand Forks Herald that medical records in the possession of a government agency may be protected by an implied constitutional right to privacy. 307 N.W.2d at 580 (VandeWalle, J., concurring specially). However, this was not a majority position of the court, nor is it clear how an implied constitutional right could be an exception to an express constitutional provision requiring that all government records be open to the public.

It is my opinion that there is no state statute, federal law or regulation, or constitutional right to privacy, which applies to the records which have been withheld by Mr. Sickler. Therefore, Mr. Sickler violated N.D.C.C. § 44-04-18 by failing to grant the request of The Dickinson Press for the records. While many people, including me, might prefer that some of these records be closed to the public, that is a remedy which must be sought from the Legislature.

In addition, although it is prudent for a public official to be concerned with potential liability which might result from releasing records, the proper course of action is for the public official to seek legal advice on whether to release the records. It is not appropriate to deny a request in an abundance of caution simply because potential liability from the release cannot be ruled out. Such an approach overlooks the very real possibility of liability to the public entity for violations of the open records law. See N.D.C.C. § 44-04-21.2 (attorney fees and damages).

CONCLUSIONS

1. The SWMCCC violated N.D.C.C. § 44-04-18(6) by failing to describe the legal authority for its denial of the request for the medical records of the deceased juvenile inmate.

2. The SWMCCC violated N.D.C.C. § 44-04-18 by denying the request for the medical records of the deceased juvenile.

STEPS NEEDED TO REMEDY VIOLATIONS

The SWMCCC must provide the requested records to The Dickinson Press. Failure to disclose a record as described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. § 44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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